IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LEONARD D. BRONK,

Debtor-Appellant/Cross-Appellee,

v.

JOHN M. CIRILLI,

Trustee-Appellee/Cross-Appellant.

OPINION AND ORDER

11-cv-172-wmc

On the eve of his filing for bankruptcy, Leonard D. Bronk attempted to convert his remaining, non-exempt assets into exempt ones, purchasing an annuity that he claims is exempt under Wis. Stat. § 815.18(3)(j) and borrowing against his home equity to purchase educational savings plans for his grandchildren that he claims is exempt under Wis. Stat. § 815.18(3)(p). John M. Cirilli, as the trustee of the bankruptcy estate, sought to deny Bronk's discharge, arguing that his bankruptcy planning was an attempt to hinder, delay or defraud creditors under 11 U.S.C. § 727(a)(2)(A); the trustee also objected to the claimed exemptions, arguing the assets did not meet the statutory requirements.

In a thorough and well-reasoned decision, Chief Judge Thomas S. Utschig of the Bankruptcy Court for the Western District of Wisconsin (1) dismissed the adversary proceeding because it found that Bronk did not have the intent to defraud creditors; (2) allowed the exemption for the annuity; and (3) disallowed the exemption for the educational savings plans. *In re Bronk*, 444 B.R. 902 (Bankr. W.D. Wis. 2011). Both parties have appealed. While the court will remand to the bankruptcy court for

narrowly-defined, additional factual findings regarding the nature of Bronk's annuity, the court will affirm the bankruptcy court's judgment in all other respects.

BACKGROUND[1]

The debtor, Leonard Bronk, is a retiree in his seventies whose income appears to be limited to social security benefits and a modest pension. He incurred substantial debts relating to medical care for his late wife, apparently as a result of an error in her health insurance enrollment. On August 5, 2009, Bronk filed a chapter 7 bankruptcy petition.

Before filing, however, Bronk sought an attorney's advice about exemption planning. In May 2009, he borrowed $95,000 from Citizens Bank, giving the bank a mortgage on his previously unencumbered home and using the proceeds to fund five Section 529 college savings accounts for his grandchildren. In July 2009, he converted a $42,000 certificate of deposit into an annuity with CM Life Insurance Company. (The record contains little information about the nature of the annuity.) Bronk admits that (1) he entered into these transactions to convert his remaining assets into exempt property, protected from creditors in a bankruptcy proceeding; and (2) his attorney advised that the transactions would help Bronk remain in his home and defray his grandchildren's educational expenses.

The trustee, appellee John M. Cirilli objected, arguing both that (1) the transactions barred Bronk's discharge as attempts to hinder, delay or defraud creditors;

[1] A more detailed set of factual findings are contained in the bankruptcy court's decision, from which the short summary above is derived.

and (2) they do not meet the requirements of the relevant statutory exemptions in any event. The parties stipulated to the facts and submitted the discharge and exemption issues to the bankruptcy court, which held oral argument on October 6, 2010, and issued a memorandum opinion and order on January 7, 2011. (Bankr. dkt. ## 37, 38.)

The bankruptcy court held that Bronk was entitled to discharge, because it found insufficient evidence to conclude that he intended to hinder, delay or defraud creditors in violation of 11 U.S.C. § 727(a)(2)(A). *In re Bronk*, 444 B.R. at 908-17. The court disallowed Bronk's claim of exemption for the Section 529 college savings accounts, because it found Wis. Stat. §815.18(3)(p) exempted only a beneficiary's interest in a qualified college savings plan. *Id*. at 917-25. Finally, the bankruptcy court found that the annuity qualified for a full exemption as a retirement annuity under Wis. Stat. § 815.18(3)(j), rather than being limited to $4,000 as an unmatured annuity under Wis. Stat. § 815.18(3)(f). *Id*. at 925-26.

OPINION

Pursuant to 28 U.S.C. § 158(a) and Federal Rule of Bankruptcy Procedure 8001, both parties have appealed the bankruptcy court's judgment. Bronk appeals the court's ruling disallowing his exemption for the Section 529 college savings plans, arguing that the court misinterpreted Wis. Stat. § 815.18(3)(p). The trustee cross-appeals the court's rulings that (1) Bronk was entitled to discharge, arguing that its finding that Bronk did not intend to hinder, delay or defraud his creditors was clearly erroneous; and (2) Bronk's annuity is fully exempt as a retirement annuity under Wis. Stat. § 815.18(3)(j).

This court reviews the bankruptcy court's findings of fact deferentially for clear error and its conclusions on legal questions or mixed questions of law and fact *de novo.* Fed. R. Bankr. P. 8013; *Mungo v. Taylor,* 355 F.3d 969, 974 (7th Cir. 2004).

A. Fraudulent Transfer

Under 11 U.S.C. § 727(a)(2)(A), a debtor is entitled to discharge in bankruptcy unless

> the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed . . . property of the debtor, within one year before the date of the filing of the petition . . . .

A trustee seeking to deny discharge under this provision of the bankruptcy code must prove that (1) the debtor acted to transfer, remove, destroy, mutilate or conceal property; (2) these actions occurred within the year prior to bankruptcy filing; and (3) the debtor acted with the actual intent to hinder, delay or defraud creditors. *In re Smiley*, 864 F.2d 562, 565 (7th Cir. 1989). A court may also disallow exemptions under Wisconsin law if "the debtor procured, concealed or transferred assets with the intention of defrauding creditors." Wis. Stat. § 815.18(10). Because the standard is the same whether a trustee seeks to deny a discharge or disallow an exemption, these statutes are properly analyzed together.[2] *See In re Bogue*, 240 B.R. 742, 750 (Bankr. E.D. Wis. 1999); *In re Przybylski*, 340 B.R. 624, 629-30 (Bankr. E.D. Wis. 2006).

[2] These exemptions may also be disallowed if the annuity or college savings accounts fail to meet statutory requirements, but the court will consider the intent issue first, because it could render any exemption issues moot.

The bankruptcy court's findings about Bronk's intent to hinder, delay or defraud under Section 727(a)(2) is a factual determination that this court reviews only for clear error. *Smiley,* 864 F.2d at 566; Fed. R. Bankr. P. 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous."). Moreover, the mere conversion of non-exempt into exempt property within the year preceding a petition is not necessarily fraudulent to creditors, even if the debtor's express intent is to shield valuable assets, because the law allows debtors to use exemptions to their full extent. *Smiley*, 864 F.2d at 566-67. As explained in detail by the bankruptcy court, somewhat counter-intuitively, this means that Bronk's admitted intent to shield his assets by taking advantage of exemptions is not by itself evidence of an intent to hinder, delay or defraud creditors.

As the Seventh Circuit instructed in *Smiley*, a debtor's discharge should be denied only "where the debtor has committed some act *extrinsic to the conversion* which hinders, delays or defrauds." *Id*. Such "extrinsic signs of fraud" may include

> (1) that the debtor obtained credit in order to purchase exempt property; (2) that the conversion occurred after the entry of a large judgment against the debtor; (3) that the debtor had engaged in a pattern of sharp dealing prior to bankruptcy; . . . and [(4)] that the conversion rendered the debtor insolvent.

Id. (quoting *Collier on Bankruptcy*, ¶ 727.02[3] at 19-20 (15th ed. 1986)).

Here, despite incurring a health care debt exceeding $200,000, Bronk used non-exempt property to obtain credit with which he then purchased exempt property. While these actions are arguably "extrinsic signs of fraud" recognized in *Smiley*, his actions are still far less troubling than the debtor's course of conduct in that case. In *Smiley*, the

debtor was in the midst of negotiations with creditors when he secretly borrowed $380,000 against the non-exempt equity in his home, a promissory note and a life-insurance policy; he then used the proceeds to purchase a home in a different state where it would be fully exempt. *Id*. at 563-64. In subsequent negotiations, the debtor further misrepresented the value of the three mortgaged assets to stall the creditors long enough to establish residency in the second state. *Id*. Despite these actions, the Seventh Circuit concluded that, "since [the debtor] was trying to take advantages of legal exemptions, it is not clear he intended to *defraud* his creditors." *Id.* at 568 (emphasis in original). Instead, the court held that it was "clear that he intended *to hinder or delay* his creditors." *Id.* (emphasis added.)

While Bronk obtained a loan against the equity in his home in order to purchase exempt property, the Seventh Circuit explained in *Smiley* that this factor alone was insufficient to compel a clear finding of intent to defraud creditors. *Smiley*, 864 F.2d at 568. Moreover, while Bronk faced a lawsuit related to his large debt, no judgment appears to have ever been entered, no doubt because of his bankruptcy petition.[3] If the mere conversion of non-exempt into exempt assets in light of a lawsuit was sufficient to establish fraudulent intent as a matter of law, then "it would mean that prospective debtors could engage in exemption planning only up until the point where it appeared they might need to do so." *In re Crater*, 286 B.R. 756, 765 (Bankr. D. Ariz. 2002).

[3] The bankruptcy court acknowledged some uncertainty about whether a judgment was entered against Bronk. In his statement of financial affairs, Bronk identified a lawsuit, *St. Michael's Hospital v. Leonard Bronk*, Case No. 09-CV-95 in Portage County Circuit Court, listing a debt to St. Michael's in the amount of $232,000. The records of the Portage County Circuit Court report only that the case was dismissed without prejudice.

Moreover, as the bankruptcy court found, Bronk's conduct exhibited none of the remaining "extrinsic signs of fraud." *In re Bronk*, 44 B.R. at 916-17. Certainly, there is no suggestion Bronk engaged in sharp dealing with creditors. In contrast, in *In re Reed*, 700 F.2d 986 (5th Cir. 1983), which the Seventh Circuit cited approvingly in *Smiley*, the debtor obtained an agreement from creditors to postpone collection and then proceeded to transfer his assets into exempt property, using business receipts that he deposited secretly in a new account and selling his personal property at less than fair market value. *Reed*, 700 F.2d at 991-92. Here, Bronk was neither in the midst of negotiations with creditors when he made the transfers, nor did he make false statements or misleading promises to his creditors.

Similarly, the conversion did not render Bronk insolvent; he was insolvent already. The trustee argues that it should be sufficient that Bronk's transfers reduced the amount of assets available to creditors, but that proposition cannot be correct because *any* conversion of non-exempt assets into exempt ones reduces the property available to creditors.

The trustee points to other "extrinsic signs of fraud" recognized by courts in addition to those in *Smiley*. While none of these cases are binding authority, the bankruptcy court's survey of opinions applying the "extrinsic signs" and similar tests is instructive. *In re Bronk*, 44 B.R. at 908-17. For instance, in *Bogue*, the bankruptcy court listed a series of extrinsic signs, including the amount of the exemption, the proximity to filing, the source of funds, misleading contacts with creditors and the purpose of the conversion. *Bogue,* 240 B.R. at 750-51. Applying these factors, the court found that a

debtor did not have a fraudulent intent when he sold property and used the non-exempt funds to purchase an exempt annuity "only a matter of days before filing." *Id.* at 750-51.

In *Pryzbylski*, the bankruptcy court applied the *Bogue* list of factors in finding an intent to defraud. The debtors in *Pryzbylski* promised repeatedly to pay creditors from refinanced property, but when the negotiations broke down, they used the loan proceeds to purchase exempt property. 340 B.R. at 630-31. In addition, they engaged in other suspicious transfers, such as paying debts to relatives and funding a 401(k) and a life insurance plan.[4] *Id.* at 632.

The Ninth Circuit found fraudulent intent in several similar cases, because the debtor tried to delay creditors until he or she could purchase exempt property, either by misleading them or concealing the non-exempt assets. *E.g. In re Reed*, 700 F.2d at 991; *In re Bernard*, 96 F.3d 1279, 1281 (9th Cir. 1996). In other cases, courts have denied discharges because the debtors hid property and purchased property in another person's name. *E.g. In re Stasch*, No. 05-20789, 2008 Bankr. LEXIS 1060, *26 (Bankr. S.D. Fla. Mar. 31, 2008); *In re McNamara*, 89 B.R. 648 (Bankr. N.D. Ohio 1988).

While courts often list obtaining loans and proximity to the bankruptcy as relevant, courts tend to find an actual intent to hinder, delay or defraud creditors only when the debtor took some *affirmative steps* to obstruct, misdirect and mislead, if not outright lie, rather than merely convert equity into exempt property on the eve of

[4] Insofar as *Bogue* and *Pryzbylski* rely on the size of the exemption to determine the debtor's intent, those cases conflict with *Smiley.* Indeed, the Seventh Circuit discussed the disagreement among courts about the relevance of the amount of an exemption and concluded expressly that the amount claimed as exempt was not a relevant factor in determining a debtor's intent. *Smiley*, 864 F.2d at 567.

bankruptcy. *See e.g., In re Stern*, 345 F.3d 1036 (9th Cir. 2003) (holding mere fact that debtor purchased $1.4 million of exempt pension funds on eve of bankruptcy was insufficient to establish intent). The trustee identified no facts to suggest that Bronk engaged in any deceitful behavior intended to delay, hinder or defraud creditors while he transferred his assets into exempt property. Rather, the facts show Bronk pursued his putative exemptions aggressively, but honestly in consultation with counsel.

Even if these facts were enough to find intent as a matter of fact, this was for the bankruptcy court to find on the evidence before it. When compared to the behavior of the debtors in *Smiley* and *Reed*, this court cannot conclude on appeal that the bankruptcy court's ultimate finding that Bronk's actions here were insufficient to evince an intent to defraud was clearly erroneous.[5] Accordingly, the bankruptcy court's ruling permitting Bronk's discharge and rejecting the trustee's motion to disallow the exemptions as fraudulent must be affirmed.

B. Annuity

Although Bronk was entitled to discharge, his claimed exemptions must still meet statutory requirements. The trustee appealed the bankruptcy court's ruling that Bronk's

[5] Because the parties stipulated to the facts and no evidentiary hearing was held, this court and the bankruptcy court are arguably in similar positions to apply the *Smiley* factors. The United States Supreme Court has explained, however, that a clearly erroneous standard of review is appropriate, "even when a district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 574-75 (1985) (applying Fed. R. Civ. P. 52). *See also RCI Ne. Services Div. v. Boston Edison Co.*, 822 F.2d 199, 202 (1st Cir. 1987) ("It is by now settled beyond peradventure that findings of fact do not forfeit 'clearly erroneous' deference merely because they stem from a paper record."). In any event, as reflected in the analysis above, this court would also have affirmed the bankruptcy court's intent finding under *de novo* review.

annuity qualifies for a full exemption as a retirement annuity under Wis. Stat. § 815.18(3)(j), rather than for an exemption as an unmatured annuity capped at $4,000 under Wis. Stat. § 815.18(3)(f). This court reviews the bankruptcy court's statutory interpretation *de novo*.

Once a debtor files a bankruptcy petition, the bankruptcy estate assumes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The Bankruptcy Code then permits debtors to claim exemptions under either the Code or state law. 11 U.S.C. § 522(b)(1). When a debtor selects state law exemptions, state law determines the scope of those exemptions. *In re Norris*, 413 F.3d 526, 527 (5th Cir. 2005); *Norwest Bank Neb., N.A. v. Tveten*, 848 F.2d 871, 873 (8th Cir. 1998). The "basic task" of a federal court interpreting state law exemptions "is to discern the will of the state legislature." *In re Geise*, 992 F.2d 651, 658 (7th Cir. 1993).

If the statutory language is plain, the statute will be enforced according to its terms; only if the language is ambiguous or its plain meaning is absurd should the court refer to extrinsic sources, such as legislative history. *Julius v. Druckrey*, 214 Wis. 643, 649, 254 N.W. 358 (Wis. 1934); *Megal Dev. Corp. v. Shadof*, 2005 WI 151, ¶¶ 16, 22, 286 Wis. 2d 105, 705 N.W.2d 645 (2005). Of course, statutory language should still be interpreted in context, in relation to surrounding language and the language in closely-related statutes. *State v. Quintana*, 2008 WI 33, ¶ 14, 308 Wis. 2d 615, 748 N.W.2d 447 (2008).

The policy underlying the Wisconsin property exemptions seeks to strike a subtle balance. On the one hand, the Wisconsin Supreme Court explains that:

> It is well settled that exemption laws must have a liberal construction, within the limits contemplated by the legislature, so as to secure their full benefit to the debtor, in order to advance the humane purpose of preserving to the unfortunate or improvident debtor and his family the means of obtaining a livelihood and thus prevent him from becoming a charge upon the public.

Julius, 214 Wis. at 649. This principle is now codified in Wis. Stat. § 815.18(1). On the other hand, "principles of liberal construction cannot be employed to write exemptions into the statute." *Schawnz v. Teper*, 66 Wis. 2d 157, 164, 223 N.W.2d 896 (1974). Exemptions are a statutory privilege, not a common law right; absent a statutory exemption, all of a debtor's legal or equitable property interests are subject to the bankruptcy estate. *Geise*, 992 F.2d at 656.

Wisconsin statutes recognize two, separate property exemptions governing annuities. First, Subdivision (3)(j), entitled "Retirement benefits," exempts:

> Assets held or amounts payable under any retirement, pension, disability, death benefit, stock bonus, profit sharing plan, annuity, individual retirement account, individual retirement annuity, Keogh, 401-K or similar plan or contract providing benefits by reason of age, illness, disability, death or length of service and payments made to the debtor therefrom.[6]

[6] Wis. Stat. § 815.18(3)(j)(2) also requires a plan to be either in compliance with the internal revenue code or be sponsored by an employer. In an offhand comment, the trustee questions in his appellate brief whether Bronk's annuity complies with the provision of the internal revenue code. (Appellee's Br. (dkt. #3) 32.) This question raises a substantial question of law. *See In re Bruski*, 226 B.R. 422 (Bankr. W.D. Wis. 1998). Because it does not appear he asserted this argument below and he did not develop it in his appellate brief, the court finds this argument waived. *Goren v. New Vision Intern., Inc.,* 156 F.3d 721, 727 (7th Cir. 1998) (perfunctory arguments not developed or supported with authority are waived).

Wis. Stat. § 815.18(3)(j). Second, subdivision (3)(f), entitled "Life insurance and annuities," provides an exemption for:

> any unmatured life insurance or annuity contract owned by the debtor and insuring the debtor, the debtor's dependent, or an individual of whom the debtor is a dependent, other than a credit life insurance contract, and the debtor's aggregate interest, not to exceed $150,000 in value, in any accrued dividends, interest, or loan value of all unmatured life insurance or annuity contracts owned by the debtor and insuring the debtor, the debtor's dependent, or an individual of whom the debtor is a dependent.

Wis. Stat. § 815.18(3)(f)(2). If an annuity claimed under this subdivision was recently issued or recently funded, "less than 24 months before the applicable date," then the exemption may not exceed $4,000. Wis. Stat. § 815.18(3)(f)(3).

Read together, these subdivisions divide up the world of annuities. If an annuity "provid[es] benefits by reason of age, illness, disability, death or length of service," then a debtor may claim exemption for the full value of the annuity under § 815.18(3)(j) regardless of when it was funded or matured. If an annuity does not qualify for (3)(j), then a debtor may claim exemption under § 815.18(3)(f), but that exemption is limited to $150,000 in total. Moreover, for any funds placed in a (3)(f) annuity within 24 months of the claim of exemption or cause of action, the exemption is capped at $4,000.[7]

Bronk purchased his $42,000 annuity within weeks of filing, but claimed it as exempt for its full value under Wis. Stat. § 815.18(3)(j). Accordingly, the issue raised on appeal is whether Bronk's annuity "provid[es] benefits by reason of age, illness, disability,

[7] By its terms, this overall $150,00 limit and the $4,000 limit for recently issued or funded annuities do not appear to apply to annuities that satisfy § 815.18(3)(3)(j).

death or length of service" under § 815.18(3)(j) or whether his annuity is subject to an exemption under § 815.18(3)(f) and, thus, subject to its $4,000 limit.

Without describing the nature of the annuity, the bankruptcy court held that the annuity was a retirement benefit entitled to a full exemption under § 815.18(3)(j). The bankruptcy court's conclusion appears to rest on a broad interpretation of § 815.18(3)(j) adopted in *In re Bogue*, 240 B.R. at 749.[8] When *Bogue* was decided, however, § 815.18(3)(j) was the only provision recognizing an exemption for annuities. The bankruptcy court in *Bogue* found that the phrase "by reason of age" was ambiguous, such that the provision might be read to create exemptions for *any* annuities that a debtor *purchased because of* his age in anticipation of retirement needs or, more narrowly, for annuities that *distribute benefits upon* the annuitant reaching a specified age. *Bogue*, 240 B.R. at 749. Citing legislative history and the principle that exemptions should be construed liberally to provide for debtors' needs, the court selected the former interpretation. Consequently, the *Bogue* court held that the 58 year-old debtor's annuities were exempt because they were purchased to meet basic retirement needs, even though they called for one-year, fixed-term distributions.

By focusing on the phrase "by reason of" in isolation, both the *Bogue* court and the bankruptcy court in this case appear to gloss over the actual language of the statute even as written in 1998. The entire, applicable phrase is "*providing benefits by reason* of age,

[8] The court also relies on *In re Bruski*, but *Bruski* held that an annuity provided benefits by reason of age when it paid out once the annuitant reached age 59½, without discussing the meaning of the phrase "providing benefits by reason of age." *In re Bruski*, 226 B.R. 422, 424 (Bankr. W.D. Wis. 1998). In the present case, the court did not find that the annuity paid out at a particular age.

illness, disability, death or length of service." When interpreting a similar exemption in the Bankruptcy Code, 11 U.S.C. § 522(d)(10)(E), the Supreme Court explained that an interpretation of the meaning of phrases like "on account of," "because of" or "by reason of" require a "causal connection" between the modified phrase and the enumerated factors. *Rousey v. Jacoway*, 544 U.S. 320, 326-27 (2005) (right to benefits from IRA was "on account of" age, because withdrawals prior to 59 1/2 were subject to 10% penalty). Because the phrase "by reason of" modifies "providing benefits" and enumerates the specific conditions that qualify, an annuity that a person purchased because of their age does not necessarily *provide benefits because of their age*. Instead, Wis. Stat. § 815.18(3)(j) exempts an annuity only if it conditions *distribution* of benefits *based on* age, illness, disability, death or length of service.

Further support for this proposition is that the interpretation of § 815.18(3)(j) adopted in *Bogue* now conflicts with the current structure of Wisconsin's two annuity provisions. Although § 815.18(3)(f) and (3)(j) were not enacted contemporaneously, they create a reasonable scheme of annuity exemptions when read together. If § 815.18(3)(j) is read to provide an exemption for any annuity purchased in anticipation of retirement needs, then few annuities will ever fall outside its scope, rendering the Legislature's addition of § 815.18(3)(f) largely superfluous.

The interpretation of the retirement annuity exemption adopted in *Bogue* also avoids the apparent limits of § 815.18(3)(f), increasing the potential for exemption abuse. Indeed, the reasoning of *Bogue* cannot be confined to annuities: it would authorize a debtor to claim as exempt any stock bonus plan, profit sharing plan, Keogh or 401-K

that he or she purchased for retirement needs, without respect to the value of the asset or the timing of its purchase.[9]

Although resort to legislative history appears unnecessary because the statute is unambiguous and does not lead to an absurd result, *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Natural Res.*, 2004 WI 40, ¶¶ 7-8, 270 Wis. 2d 318, 677 N.W.2d 612 (2004), the bankruptcy court considered the legislative history and so will this court. After finding § 815.18(3)(j) ambiguous, the bankruptcy court opinion appears to draw confirmation for the *Bogue* interpretation from the legislative history of § 815.18(3)(f), while this court does not.

Annuities were added to § 815.18(3)(f) in 2003 Wisconsin Act 304. The bankruptcy court concluded, correctly, that the legislative history contains "no indication that the legislature intended to overturn the prior interpretation of § 815.18(3)(j)." The bankruptcy court took this conclusion a step further, however, arguing that the Wisconsin Legislature "envisioned that it was providing an additional exemption for certain 'unmatured' annuities which might not be subject to the additional requirements of the existing provisions." Insofar as this argument implies that the new annuity provision enacted in 2003, Wis. Stat. § 815.18(3)(f), evinces legislative approval for the *Bogue* court's earlier interpretation of retirement annuities, this court finds nothing in the legislative history to suggest the Wisconsin Legislature was even aware of that court's

[9] The courts in *Bogue* and *Bruski* acknowledged this potential for abuse, but they were satisfied that courts could disallow exemptions under Wis. Stat. § 815.18(10), if the debtor intended to hinder, delay or defraud creditors. *Bruski*, 226 B.R. at 425-26. Given the expansive scope of the apparent exemption advocated in those decisions, inconsistencies (if not outright conflict) with the actual language of the statute *and* the difficulty of proving intent to defraud, this court finds that limitation less reassuring.

expansive interpretation of § 815.18(3)(j), much less implicitly ratified it. On the contrary, the Legislative Reference Bureau asserted in its analysis of the bill as introduced that "current law does not address exemptions from creditor claims for an unmatured annuity that is owned by the debtor and insures the debtor, his dependent or a person on whom the debtor is dependent . . . ." 2003 S.B. 504. This statement certainly reflects an expectation that S.B. 504 would expand exemptions for annuities,[10] but it was at best an incomplete statement of the law as it ignored the annuity exemption already in place in § 815.18(3)(j) altogether. When a substitute amendment was introduced to except those annuities already covered under § 815.18(3)(j), the LRB's analysis also failed to refer, explicitly or implicitly, to the bankruptcy courts' interpretation of the scope of that exemption, stating only that the amended provisions "do not apply with respect to the annuities already exempted under s. 818.15 (3) (j), Stats, relating to exemptions for retirement benefits." Wis. Legis. Council, Amend. Mem., 2003 S.B. 504 (May 12, 2004).

In this court's view, this meager legislative history does not support a presumption that the Legislature tacitly ratified *Bogue's* interpretation of § 815.18(3)(j). Moreover, evidence of tacit ratification "is overcome where prior construction is contrary to the clear and express language of the statute," because the language provides "better evidence of the true legislative intent." *Wenke v. Gehl Co.*, 2004 WI 103, ¶¶ 9-16, 274 Wis. 2d

[10] As originally introduced, the bill did not include the overall $150,000 cap, but it did limit the exemption to $4,000 for annuities purchased with 24 months of the petition. 2003 Reg. Sess. S.B. 504.

220, 682 N.W.2d 405 (2004) (quoting *Green Bay Packaging v. DILHR*, 72 Wis. 2d 26, 35, 240 N.W.2d 422 (Wis. 1976)).

For all these reasons, the court concludes that § 815.18(3)(j) provides an exemption in bankruptcy for an annuity only if the annuity conditions distributions by its terms on the recipient's age, illness, disability, death or length of service. Since the bankruptcy court's opinion contains insufficient information about the nature of the annuity to determine whether this is so, this court will remand to the bankruptcy court for further fact-finding. *In re Bronk*, 444 B.R. at 926.

C. Educational Savings Plans

Finally, Bronk appeals from the bankruptcy court's order disallowing his claim of exemption for five Section 529 educational savings plans. The bankruptcy court concluded, and this agrees, that Wis. Stat. § 815.18(3)(p) does not provide an exemption for Bronk's interest as the owner of the college savings accounts. The exempt status of Section 529 plans under Wisconsin law appears to be an issue of first impression.

Before broaching the statutory interpretation issue, a short description of Section 529 college savings plans ("529 Plans") may be useful. To encourage college savings, Congress enacted 26 U.S.C. § 529. This statute empowers states to sponsor "qualified tuition programs," which in turn enable individuals to establish college savings plans that receive favorable federal tax treatment. The state statutory schemes vary, but two basic types of 529 Plans exist: prepaid tuition plans and college savings accounts. In prepaid college tuition plans, the contributions pay for future tuition in current dollars and at current prices. In college savings accounts, contributions may be placed in a variety of

investment options, and all accrued earnings and withdrawals for qualified college expenses are treated as tax exempt. 26 U.S.C. § 529(c). Under this statute, Wisconsin sponsors a prepaid college tuition plan and a college savings account program. Wis. Stat. §§ 14.63, 14.64.[11]

Bronk purchased Wisconsin college savings accounts and, as the person who established the account, is the "account owner." Wis. Stat. § 14.64(1)(a). Although the tax code treats contributions to 529 Plans as completed gifts to the beneficiary, 26 U.S.C. § 529(c)(2), the account owner retains control over the plan. The account owner may select or change the beneficiary, transfer the funds to another account or terminate the account and disperse the funds to him or herself. Wis. Stat. § 14.64(3). If an account owner withdraws the funds for any reason except qualified higher education expenses, then he or she must pay income tax and an additional 10% penalty on the earnings. 26 U.S.C. § 529(c)(6). The control maintained by an account owner over a 529 Plan is considered a property interest, which becomes part of the estate under 11 U.S.C. § 541(a)(1) absent a statutory exemption. *See In re Bourguignon*, 416 B.R. 745, 750 (Bankr. D. Idaho 2009) (holding bankruptcy estate included account owner's interest in Section 529 college savings plan).

The Bankruptcy Code provides a property exemption for funds in a 529 plan. 11 U.S.C. 541(b)(6). The amount of the exemption varies along a "sliding scale" based on the proximity in time of the contributions to the filing. *Bourguignon*, 416 B.R. at 752. Any qualifying contributions made at least 720 days before filing the petition are fully

[11] Effective July 1, 2011, Wis. Stat. § 14.64 was renumbered as § 16.641 and amended in ways not relevant to the present litigation. 2011 Act 32, § 76.

exempt, contributions made between 720 and 365 days before filing are exempt up to $5,850, and contributions made less than 365 days before filing are not exempt. 11 U.S.C. § 541(b)(6). Because Bronk purchased his 529 college savings accounts within four months of filing his petition, he could not claim them as exempt under 11 U.S.C. § 541(b)(6).

Bronk argues 529 college savings accounts may still be exempt under state law. Two Wisconsin statutory provisions mention an exemption for 529 college savings accounts. First, there is a property exemption for "an interest in a college savings account under s. 14.64." Wis. Stat. § 815.18(3)(p). The cross-referenced section is Wisconsin's college savings program, which was enacted in the same act as the property exemption. 1999 Wis. Act 44. The college savings program includes a second provision, which states

> EXEMPTION FROM GARNISHMENT, ATTACH-MENT AND EXECUTION; SECURITY FOR LOAN.
>
> (a) A beneficiary's right to qualified withdrawals under this section is not subject to garnishment, attachment, execution or other process of law.

Wis. Stat. § 14.64(7).

Since the relationship between these two provisions is unclear, the issue on appeal is whether "an interest in an college savings account created under s. 14.64" encompasses (1) all property interests created under § 14.64, including an account owner's interest, or (2) just interests that § 14.64(7) recognizes explicitly as exempt, which would only include the beneficiary's right to qualified withdrawals.

Fortunately, the parallel statutory exemptions for Wisconsin's prepaid tuition program offer substantial guidance. The prepaid tuition program, § 14.63, and the

college savings program, § 14.64, are related statutes with many parallel provisions. Indeed, the act that created Wisconsin's college saving program also amended Wisconsin's prepaid tuition program. 1999 Wis. Act 44. Like college savings accounts, prepaid tuition plans are covered by two property exemptions. The first provides an exemption for "[t]uition units purchased under s. 16.63." Wis. Stat. § 815.18(3)(o). Second, the prepaid tuition program section provides:

> EXEMPTION FROM GARNISHMENT, ATTACH-MENT AND EXECUTION; SECURITY FOR LOAN.
>
> Moneys deposited in the tuition trust fund and a beneficiary's right to the payment of tuition, fees and the costs described in sub. (5) (a) under this section are not subject to garnishment, attachment, execution or any other process of law.

Wis. Stat. § 14.64(8).

The exemption provision in the college savings program covers only "a beneficiary's right to the payment," but the analogous provision in the prepaid tuition program covers both "a beneficiary's right to the payment" and "moneys deposited in the tuition trust fund." Having selected different phrases for these parallel provisions, and even doing so within the same act, one might reasonably presume that the legislature expected the assets in the two programs would receive different treatment. *Graziano v. Town of Long Lake*, 191 Wis. 2d 812, 822, 530 N.W.2d 55 (Ct. App. 1995). Moreover, creating an exemption for money deposited in prepaid tuition plans, but not for money deposited in a college savings plan, seems reasonable, because an account owner retains the power to terminate a college savings account and disburse the funds to him or herself (albeit with a penalty), a significant difference between the two types of 529 plans and

one a legislature might reasonably draw in deciding whether to grant the owner a property exemption.

Although neither party has identified another state that treat funds in prepaid tuition plans and college savings accounts differently, that is not surprising given that states do not provide uniform treatment of 529 plans generally.[12] Until recently, Louisiana had a statute that, similar to Wis. Stat. § 14.64(7), provided an exemption only for the beneficiary's interest in a college savings account. Louisiana's education savings accounts program provided only that "[t]he right of a beneficiary to the assets of an education savings account shall not be subject to . . . the operation of bankruptcy . . ." La. Rev. Stat. § 17:3096(G) (2009). In June 2010, Louisiana amended its exemption provision to add that

> Monies paid into or out of the assets and the income of any validly existing qualified tuition program authorized by Section 529 of the Internal Revenue Code of 1986 as amended . . . shall not be liable to . . . legal process in the state in favor of any creditor of or claimant against any program participant, owner, or contributor, or program."

[12] The bankruptcy court provides a more thorough review of state statutes. *In re Bronk*, 444 B.R. at 923-24. Some states offer a full exemption for any funds in an educational savings account. *E.g.* Fla. Stat. § 222.22(1); Va. Code Ann. § 23-38.8; N.J. Stat. § 18A:71B-41.1; Alaska Stat. § 14.40.802. Others provide no property exemption for contributions to 529 plans. *See In re Addison*, 540 F.3d 805, 820 (8th Cir. 2008) (interpreting Minnesota law); *In re Sanchez*, 2006 Bankr. LEXIS 284, 2006 WL 395225 (Bankr. D. Mass. Feb. 14, 2006) (interpreting Massachusetts law). Many states seek a middle ground, creating an exemption but disallowing it or limiting its amount in circumstances likely to indicate abuse. *E.g.* S.D. Codified Laws § 13-63-20 (fully exempt, but no exemption for funds "contributed within one year prior to the account owner or contributor filing"); Nev. Rev. Stat. Ann. § 21.090(r) (up to $500,000 exempt, unless funds deposited after entry of judgment against owner or funds will not be used to attend university); 735 Ill. Comp. Stat. 5/12-1001 (sliding scale exemption that mirrors the federal exemption).

La. Rev. Stat. § 17:3096(G) (2010). The variety of available models for property exemptions for 529 plans, along with the fact that Louisiana distinguished previously between a beneficiary's right and the money in the account, suggests that the Wisconsin Legislature might have chosen to provide an exemption only for the beneficiary's interest and not the account owner's interest in college savings accounts. In any event, plaintiff has offered no reason to give the statute a meaning different from its plain one.

Accordingly, the court concludes that Wis. Stat. § 815.18(3)(p) creates an exemption only for the beneficiary's right to qualified withdrawals and not for an account owner's interest in a 529 college saving account. Because Bronk was the account owner rather than the beneficiary of the disputed college savings accounts, the court will affirm the bankruptcy court's ruling disallowing Bronk's claim of exemption for the five Section 529 college savings accounts.

ORDER

IT IS ORDERED that

1. the bankruptcy court's judgment is VACATED;
2. the bankruptcy court's order allowing appellee Leonard C. Bronk's claim of exemption for the annuity is REVERSED;
3. the bankruptcy court's order is AFFIRMED in all other respects; and

4. the case is REMANDED to the bankruptcy court for further factual findings consistent with this opinion

Entered this 28th day of September, 2012.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge